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In re: **WHNR(AM), Cypress Gardens, Florida**
Facility ID No. 21766
File No. BAL-20120316AAP

Petition for Reconsideration

Dear Counsel and Applicant:

We have before us a Petition for Partial Reconsideration ("April Petition") filed by George R. Reed, Receiver ("Reed") on April 16, 2013, seeking reconsideration of an April 9, 2013, letter decision by the Media Bureau ("*Reconsideration Decision*")[1] to the extent that it admonished Reed for not submitting to the Commission a June 12, 2012, Order of Proceedings Supplementary by the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida (the "Court") ("Court Order"),[2] in accordance with Section 1.65 of the Commission's rules ("Section 1.65").[3] We also have before us two "Comments," one filed by La Poderosa, LLC and its owner Carlos S. Guerrero (collectively, "Poderosa") and one filed by Edward Olivares ("Olivares"), as well as a reply by Reed.[4] We also have a Petition for Reconsideration filed by Reed on May

[1] *Lewis J. Paper, Esq.*, Letter, 28 FCC Rcd 4550 (MB 2013).

[2] *Edward Olivares v. Martin Santos*, Order of Proceedings Supplementary, Case Number 2009CA-005214 (Fla. Cir. Ct. June 12, 2012).

[3] 47 C.F.R. § 1.65.

[4] On May 1, 2013, Poderosa filed a pleading entitled "Comments of La Poderosa, LLC and Carlos Guerrero on Receiver's Petition for Partial Reconsideration" ("Poderosa Comments"). On May 7, 2013, Reed filed a "Reply of George R. Reed, Receiver, to Comments of La Poderosa, LLC and Carlos Guerrero" ("Reply"). On May 14, 2013, Olivares, the judgment creditor in *Olivares v. Santos*, filed a "Comments of Judgment Creditor Olivares to Assignee's Petition for Partial Reconsideration and Reply Comments to Comments of La Poderosa, LLC & Carlos Guerrero" ("Olivares Reply"). We construe the Poderosa Comments to be an opposition to the Petition and thus

9, 2013 ("May Petition"), requesting reconsideration of the *Reconsideration Decision* should the Court instruct Reed to proceed in a manner different from that required by the *Reconsideration Decision*. Finally, we have a Motion for Stay filed by Reed on May 15, 2013 ("Motion for Stay"), requesting that the Bureau stay the effectiveness of the *Reconsideration Decision* until the later of ten business days after the Court issues instructions to Reed on how to proceed, or, if the Court directs Reed to proceed differently than the *Reconsideration Decision*, until the Bureau disposes of the May Petition.[5] For the reasons stated below, we deny the April Petition and dismiss the May Petition and Motion for Stay as moot.

Background. On August 3, 2012, the Audio Division of the Media Bureau ("Bureau") granted the above-referenced Form 316 application of licensee GB Enterprises Communications Corp. ("GB") for involuntary assignment of the license of Station WHNR(AM), Cypress Gardens, Florida (the "Station"), to Reed (the "Assignment Application").[6] In this *Letter Decision*, the Bureau relied upon a February 16, 2012, Court order consisting of an emergency motion filed by Olivares, requesting, *inter alia*, the appointment of Reed as Receiver, and a brief handwritten note by the judge on a copy of the motion granting the request ("Emergency Order").[7] In response to Poderosa's claim that the Emergency Order was unclear as to the scope of Reed's authority as Receiver, we stated that we need not withhold action on the Assignment Application for this reason but would "honor and give effect" to any future clarification by the Court on this issue.[8]

On September 4, 2012, Poderosa filed a petition for reconsideration of the *Letter Decision*. Poderosa contended that the June 12, 2012, Court Order, which had not previously been filed in the Assignment Application proceeding, had provided the needed clarification regarding Reed's receivership by establishing that Reed's authority extended only to the assets of GB's principal, Martin Santos, not those of the corporation itself.[9] Poderosa noted that the difference between an assignment application and a transfer of control is a "critical one" in terms of Poderosa's ability as a creditor to collect on a debt secured against the assets of the corporate licensee, GB. Finally, Poderosa contended that Reed's failure to supplement the Assignment Application with a copy of the Court Order constituted a Section 1.65 violation. On September 18, 2012, Reed filed an opposition to Poderosa's petition for reconsideration, ("Opposition"), arguing that there was no requirement under Section 1.65 for Reed to apprise the Commission of the Court Order because the Court Order did not modify or clarify the Emergency Order.[10]

On April 9, 2013, in the *Reconsideration Decision*, we granted Poderosa's petition, agreeing that the Court Order clarified the scope of Reed's authority and concluding that a transfer of control application, rather than an assignment application, was the appropriate vehicle to effectuate the Court's orders. Accordingly, we rescinded grant of the Assignment Application, dismissed it, and instructed Reed to file a transfer of control application with a copy of the Court Order in lieu of the licensee

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untimely under 47 C.F.R. § 1.106(g) ("Oppositions to a petition for reconsideration shall be filed within 10 days after the petition is filed . . ."). Similarly, we construe the Olivares Reply to be a reply to the Poderosa Comments that is both untimely and not filed by the original petitioner. *See* 47 C.F.R. § 1.106(h) ("*Petitioner* may reply to oppositions within seven days after the last day for filing oppositions . . .") (emphasis added). However, to the extent that the issues raised in these unauthorized pleadings are relevant to Reed's admonishment, we will address them herein.

[5] On May 23, 2013, Poderosa filed an opposition to Reed's Motion for Stay. On May 28, 2013, Poderosa filed a supplement to its opposition. On June 3, 2013, Reed filed a reply to Poderosa's opposition to the Motion for Stay.

[6] *George R. Reed, Receiver*, Letter, 27 FCC Rcd 9048 (MB 2012) ("*Letter Decision*").

[7] *Letter Decision*, 27 FCC Rcd at 9053.

[8] *Id*.

[9] *Reconsideration Decision*, 28 FCC Rcd at 4552.

[10] Opposition at 3-4.

signature. The *Reconsideration Decision* was affirmed by the Court on June 20, 2013, when the Court directed Reed to "comply with the FCC's directive to apply for an 'involuntary transfer of control' application as a means of complying with aforementioned orders in regards to the FCC License . . ."[11] Reed filed a Form 316 involuntary transfer of control application on June 28, 2013, which was granted on July 31, 2013, and consummated August 2, 2013 ("2013 Involuntary Transfer Application").[12]

Also in the *Reconsideration Decision*, we admonished Reed for failing to supplement the Assignment Application with a copy of the Court Order. We noted that in such involuntary assignment cases, the Bureau acts in reliance on a court's authorization in lieu of the signature of an authorized officer of the assignor/licensee. We also observed that the scope of Reed's authority as Receiver was a matter of decisional significance and a key contested issue in the proceeding. Therefore, we admonished Reed for failure to timely apprise the Commission of a significant development regarding the information provided in the then-pending Assignment Application, pursuant to Section 1.65.[13]

In the April Petition, Reed argues that the admonishment should be "promptly rescinded because it is premised on assumptions which do not comport with facts that are *not* a part of the record."[14] Specifically, Reed states that he *did* file the Court Order with the Commission within 30 days of receiving it, but as an attachment to a different application (the "2012 Involuntary Transfer Application").[15] Reed surmises that because Bureau staff requested that Reed dismiss the 2012 Involuntary Transfer Application, the staff "obviously concluded" that the Court Order was not material to the Assignment Application.[16] Reed also argues that the *Reconsideration Decision* assumes that he received the Court Order on or about June 12, 2012, but he did not in fact receive the Court Order until July 9, 2012. Therefore, according to Reed, his filing of the Court Order (in the 2012 Involuntary Transfer Application) on August 7, 2012, was timely because it was within 30 days of receiving it, and five days *after* the release of the *Letter Decision*.[17] Reed also characterizes as an "assumption" the *Reconsideration Letter*'s finding that the Court Order was material to the Assignment Application. Finally, Reed argues that he reasonably believed that his "new obligation [under the Court Order] to take possession of the GB stock was in addition to—and not instead of—his obligation to take possession of the GB assets, including the WHNR license."[18]

In the Poderosa Comments, Poderosa suggests that Reed may have been aware of the Court Order before July 9, 2012, even if he had not yet received a copy, and therefore his submission was untimely.[19] Poderosa also points out that the Court Order was filed with the wrong application and argues that Reed has failed to demonstrate that Bureau staff concluded that the 2012 Involuntary Transfer Application attachments were potentially relevant to the Assignment Application. Finally, Poderosa suggests that Olivares may have had an independent obligation to submit a copy of the Court Order to the Commission

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[11] *Edward Olivares v. Martin Santos*, Order Denying Intervenors' Verified Emergency Motion to Intervene, to Set Aside Appointment of Receiver and for Expedited Hearing and Granting Receiver's Request for Guidance on Certain Issues Pursuant to the Supplemental Update to Statement of Position of Receiver as to All Pending Issues, Case Number 2009CA-005214 (Fla. Cir. Ct. June 20, 2013), Ordering Clauses, para. 3.a.

[12] File No. BTC-20130628AAD.

[13] *Reconsideration Decision*, 28 FCC Rcd at 4552-3.

[14] Petition at 1 (emphasis added).

[15] *See* File No. BTC-20120807ACH.

[16] Petition at 2.

[17] *Id*. at 6-7.

[18] *Id*. at 7.

[19] Poderosa Comments at 3-4.

as the "beneficiary" of the Florida court proceeding.[20] Reed's Reply to the Poderosa Comments largely restates the April Petition, adding that the decision to file the Court Order with the 2012 Involuntary Transfer Application, not the Assignment Application, had "no prejudicial impact" on Poderosa.[21]

In the Olivares Reply, Olivares denies that he has any independent obligation under Section 1.65 to make submissions to the Commission on behalf of Reed. Olivares also states that he provided "any and all information requested by Reed" without delay and "always strived" to keep Reed "immediately apprised of any and all developments and rules of the Court . . ."[22]

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.[23] Reed has failed to meet this burden.

The facts presented in the April Petition were known and existing at the time of Reed's last opportunity to present such matters, yet Reed acknowledges that he did not disclose them at that time.[24] In the April Petition, Reed states for the first time that he filed the Court Order with the 2012 Involuntary Transfer Application. He also discloses for the first time that he received requests from Bureau staff to dismiss the 2012 Involuntary Transfer Application on August 10, 2012, and again on August 13, 2012.[25] Clearly, these facts must have been known to Reed on September 18, 2012, when he submitted the Opposition and chose not to disclose these matters in that filing. Yet, in the Opposition, Reed denied that he had violated Section 1.65 without mentioning either of the facts upon which he now relies. It is axiomatic that a party may not "sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence."[26] Because the April Petition relies on "facts or arguments not previously presented to the Commission" and therefore fails to meet the requirements of Section 1.106(c) of the Rules, we deny it on procedural grounds.[27]

Even if we were to consider the April Petition on the merits, Reed fails to show any material error in the *Reconsideration Decision*. Section 1.65 requires the applicant to amend a pending application whenever the information furnished within it is no longer substantially accurate and complete, and to submit a statement when there has been a significant change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application.[28] Applicants are required to update an application in response to either event "as promptly as possible and in any event within 30 days."[29] An application is considered "pending" for Section 1.65 purposes until a Commission

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[20] *Id*. at 6.

[21] Reply at 7.

[22] Olivares Comments at 3. To the extent that Olivares disputes the findings in the *Reconsideration Order*, he failed to participate earlier in the proceeding (or show good reason why it was not possible for him to participate) and therefore lacks standing to seek reconsideration. *See* 47 C.F.R § 1.106(b)(1).

[23] *See* 47 C.F.R § 1.106(c),(d). *See also WWIZ, Inc.,* Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

[24] Petition at 1.

[25] *Id*. at 5.

[26] *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

[27] 47 C.F.R. § 1.106(c).

[28] 47 C.F.R. § 1.65(a).

[29] *Id*.

grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.[30] This obligation exists without regard to potential "prejudice" to other parties.

Regarding Reed's contention that he did file the Court Order, as an attachment to the 2012 Involuntary Transfer Application, we observe that the express requirements of Section 1.65 are not fulfilled if the applicant submits the necessary information in the wrong application.[31] It would be administratively unworkable to require our processing staff to ascertain whether the information supplied in one application may be relevant to another, separate application. Yet this is precisely what Reed envisions, arguing that Bureau staff would not have recommended dismissal of the 2012 Involuntary Transfer Application without first assessing whether the appended Court Order was relevant to the Assignment Application.[32] We disagree. The Assignment Application, seeking to assign the Station license from GB to Reed, was granted on August 3, 2013.[33] The 2012 Involuntary Transfer Application, seeking to transfer control of GB from Santos to Reed, was filed four days later, on August 7, 2013. Because GB was no longer the Station licensee at the time the 2012 Involuntary Transfer Application was filed, it was unnecessary to seek Commission approval for a change in its ownership structure. The staff recommended dismissal of the latter-filed 2012 Involuntary Transfer Application solely due to this facial inconsistency between the two applications.[34]

In the *Reconsideration Letter*, we made no assumption, express or implied, regarding the specific dates that Reed was notified of, had public access to, or received a copy of the Court Order. That information would have been relevant if the admonishment was based on a late filing. As discussed above, admonishment was based on the fact that Reed did not *at any time* supplement the Assignment Application with a copy of the Court Order. It is irrelevant whether the 30-day deadline came before or after the release of the *Letter Decision*, as the requirement under Section 1.65 to furnish additional information continues until any actions taken on an application are final.[35] We likewise disagree with Reed that the Bureau assumed the materiality of the Court Order. Rather, we found the Court Order to be material based on a comprehensive review and analysis of the relevant Court documents and Commission record in this proceeding. Reed cites no rule or precedent requiring us to assess the reasonableness of his interpretation of the Court Order. Moreover, we note that the scope of Reed's authority as Receiver was a central and disputed issue in this proceeding, the resolution of which potentially affected the rights of GB's creditors. Even under Reed's interpretation, the Court Order had a direct bearing on this crucial issue. Therefore, the Court Order was of decisional significance and necessary to ensure the accuracy and completeness of the information provided in the Assignment Application. For these reasons, we uphold our decision that Reed was required by Section 1.65 to supplement the Assignment Application with a copy of the Court Order. Lastly, we find that, as Olivares was neither an applicant nor a party to the Assignment Application, he was under no independent obligation under Section 1.65 to update the Assignment Application.[36]

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[30] *Id*.

[31] Section 1.65 concerns the "continuing accuracy and completeness of information furnished *in* a pending application." *Id*. (emphasis added).

[32] Reply at 8.

[33] The assignment was consummated by the parties on August 4, 2013.

[34] In any case, it is well established that informal staff advice is not authoritative and is relied on by licensees at their own risk. *See, e.g., Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) ("A person relying on informal advice given by the Commission staff does so at their own risk."); *State of Oregon*, Memorandum Opinion and Order, 11 FCC Rcd 1843, 1844 (1996) (". . . informal advice is not binding").

[35] 47 C.F.R. § 1.65(a).

[36] *See* 47 C.F.R. § 1.65 (imposing an obligation *on applicants* to ensure the continuing accuracy and completeness of the information they have provided) (emphasis added).

With respect to the May Petition and Motion for Stay, we find that both are moot in light of the Court's June 20, 2013, affirmation of the *Reconsideration Decision* and Reed's subsequent filing of the 2013 Involuntary Transfer Application.

Conclusion/Actions. We find that the April Petition is based on facts that were in existence and known by Reed at the time of his last opportunity to present such matters. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration filed by Reed on April 16, 2013, IS DENIED.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Reed on May 9, 2013, the Motion for Stay filed by Reed on May 15, 2013, and all related pleadings ARE DISMISSED as moot.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau